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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 447

LAND O'LAKES DAIRY COMPANY,
Appellant,

vs.

COUNTY OF WADENA AND STATE OF MINNESOTA,
Appellees

APPEAL FROM THE SUPREME COURT OF MINNESOTA

STATEMENT AS TO JURISDICTION

Appellant, having presented this day its petition for appeal, now files this its statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the final judgments entered in the two above-entitled causes, and should exercise such jurisdiction in these cases.

This is an appeal from two judgments entered one in each of the two above-styled causes in the Supreme Court of Minnesota. For convenient reference the cause entitled *Land O'Lakes Dairy Company* v. *County of Wadena and State of Minnesota* will hereafter be referred to as "the real estate case"; and the cause entitled *State of Minnesota* v. *Land O'Lakes Dairy Company* will hereafter

be referred to as "the personal property case". As to the real estate case the judgment entered in the Supreme Court of Minnesota affirmed the judgment entered in the District Court of Wadena County, Minnesota, dismissing on the merits the suit of Appellant to have set aside a tax judgment and tax sale for *ad valorem* taxes on certain real estate. As to the personal property case the judgment entered in the Minnesota Supreme Court affirmed a judgment entered in the same District Court which was a money judgment in favor of the State and against the Appellant for the amount of an *ad valorem* personal property tax assessment.

Date of Judgments Sought To Be Revised and Date of Petition For Appeal

In each of the above causes final judgment was entered in the Supreme Court of Minnesota on October 19, 1949. The petition for appeal is dated October 24th, 1949.

Basis of Jurisdiction

In these cases there was drawn in question the validity of the general property tax statutes of Minnesota as the same were applied to real estate and personal property the legal title to which was in the United States and which was in possession of Appellant under a lease from the Government, on grounds that said statutes as so applied were repugnant to the Constitution of the United States and, therefore, void to that extent. Such statutes as applied to the property were held to be valid by the Minnesota Supreme Court.

The statutory jurisdiction of the Supreme Court of the United States to review by direct appeal the judgments complained of is conferred by Title 28, United States Code (1948 Edition), Section 1257(2), being the Act of June 25, 1948, c. 646, 62 Stat. 869.

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Cases Believed To Sustain Jurisdiction

The following cases are believed to sustain the jurisdiction of the United States Supreme Court to review on appeal the aforesaid judgments:

Dahnke-Walker Milling Co. v. *Bondurant,* 257 U. S. 282;
Lee v. *Osceola Improvement District,* 268 U. S. 643;
Van Brocklin v. *Tennessee,* 117 U. S. 151;
Clallam County v. *U. S.,* 263 U. S. 341;
Irwin v. *Wright,* 258 U. S. 219;
New Brunswick v. *U. S.,* 267 U. S. 547;
U. S. v. *Allegheny County,* 322 U. S. 174.

State Statutes Involved

The general property tax statutes of Minnesota specifically referred to in the pleadings and which were claimed to be unconstitutional as applied to the property in question are summarized as follows:

Chapter 273, Minnesota Statutes 1945, provides for the listing and assessment of all real property and personal property subject to taxation. The term "real property" as used therein is defined in Chapter 272 "to include the land itself and all buildings, structures, and improvements or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in anywise appertaining * * *." (Sec. 272.03, Subd. 2). Both real property and personal property are to be valued at their full value.

Chapter 275, Minnesota Statutes 1945, provides for the levy of an annual tax on each dollar of taxable real and personal property as assessed.

Chapter 279, Minnesota Statutes 1945, provides that on February 1st of the year following the year in which the real estate taxes are payable, the County Auditor shall file

with the Clerk of the District Court lists of descriptions of the lands upon which the taxes are delinquent, and that the filing of such lists shall have the effect of filing a complaint in an action by the County and State against the land. Said chapter provides for the entry of a tax judgment against the land for the amount of unpaid taxes, interest and costs, which judgment shall be a lien upon the land "as against every estate, right, title, interest, claim, or lien of whatever nature, in law or equity." (Sections 279.14 and 279.16.)

Chapter 280, Minnesota Statutes 1945, provides for the sale at public auction of all lands against which a tax judgment has been entered in satisfaction of said judgment, and provides that the State may be a purchaser at such tax judgment sale, and that unless the property is redeemed the sale ripens into an absolute conveyance three years from date of sale.

Chapter 277, Minnesota Statutes 1945, provides that the County Auditor shall file in the District Court the list of delinquent personal property taxes, giving the names of the persons assessed and the amount of the tax, and that thereupon a Citation shall be issued by the Clerk of Court to each delinquent. Said Citation, it is provided, shall be in the form of a complaint in an action by the State for a money judgment against the delinquent in which the delinquent may file its answer thereto. Execution may be issued on the judgment rendered "and no property shall be exempt from seizure thereon". (Sec. 277.10).

Nature of the Cases

As a part of the Lend-Lease program the Government in 1944 contracted with Appellant for the procurement of a milk dehydration plant. Under the contract Appellant was to acquire the site and build the plant and upon its com-

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pletion, and upon approval of title by the Attorney General of the United States, the Government agreed to purchase the plant (land, buildings and equipment) for a specified price (R. 9-22). The contract provided that the deed to the Government should contain a proviso clause to the effect that if the grantor paid to the grantee a certain sum of money at any time after a declaration by the President that the property was no longer needed for national defense purposes and while the lease between the parties was in effect, title shall revert to the grantor (R. 14-16).

By separate instrument executed simultaneously with the contract the Government leased the plant and equipment to Appellant, to become effective upon conveyance of title to the Government (R. 23-41). The lease ran for five years and contained elaborate provisions that the Lessee should use the property only for manufacturing certain products, all of which should be first offered to the Government (R. 28-30). Lessee was given an option to renew the lease for a second five-year period on the same conditions (R. 35). Rent was payable quarterly, but only so long as the lease was in effect (R. 30). Lessee could cancel the lease on sixty days' notice if the Government failed to purchase a certain prescribed amount of products in any six months period. After the President's Declaration of Non-Necessity, the Lessee could cancel the lease at any time on ninety days' notice (R. 29, 33). Lessee could not assign the lease or sublet the property to anyone else without the prior consent of the Government (R. 27, 40).

Pursuant to the contract, Appellant acquired the site and built the plant, which was completed on April 1, 1945 (R. 64, 79). In November 1945, the same was conveyed to the Government by combination Warranty Deed and Bill of Sale absolute in form with the proviso clause described in the contract (R. 52-59). Previous to the conveyance the

contract and the lease were each amended to provide that the title to the facility should be deemed to have vested in the Government on April 1, 1945, and the lease to have become effective on that date (R. 42-51).

The land and buildings were assessed by the State's taxing officials as of May 1, 1945, for their full value, and the equipment was assessed to Appellant as of May 1, 1946, for its full value, the taxing officials assuming to act under the tax statutes heretofore referred to. Both the real estate tax and the personal property tax embraced all interests in the property without distinction or qualification (R. 81, 103). In January 1947, Appellant instituted a suit in the District Court of Wadena County, Minnesota, against the taxing officials for a Declaratory Judgment declaring the property (both realty and personalty) immune from state taxation. The District Court sustained demurrers to the complaint, and an appeal was taken to the Supreme Court of Minnesota, *Land O'Lakes Dairy Company* v. *Village of Sebeka*, 225 Minn. 540, 31 N.W. (2d) 660. That Court decided that as to the real estate tax the proceeding should be dismissed without determination of the merits on the ground of improper remedy. As to the personal property tax, the Court decided that Appellant was not entitled to declaratory relief solely because of Appellant's having made a covenant in the lease to pay all taxes assessed or other governmental charges that may be legally imposed against the property (paragraph 12 of the lease). Certiorari to the Supreme Court of the United States was denied June 14, 1948 (334 U.S. 844).

While this Declaratory Judgment action was pending the State of Minnesota had meanwhile commenced a suit in the District Court of Wadena County under Chapter 277, Minnesota Statutes 1945, against Appellant for a money judgment for the personal property tax (which is the per-

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sonal property suit involved in this appeal). Also during this time a tax judgment was entered in the same court against the real estate and the real estate was sold at tax sale and bid in by the State. The sale was without qualification as to the interests in the property. Unless the property should be redeemed this sale, if valid, will ripen into an absolute conveyance on May 12, 1950.

After conclusion of the Declaratory Judgment action, Appellant commenced suit in the District Court of Wadena County to have set aside the real estate tax judgment and sale and at the same time interposed its answer in the personal property tax suit. Both these actions, the suit by the State against Appellant to collect the personal property tax and Appellant's suit against the State to set aside the real estate tax sale, were tried together. The evidence consisted essentially of the documents above mentioned and it was stipulated that the real estate had not been redeemed from the tax sale, and that the lease remained in full force and effect.

The District Court held adversely to Appellant in both actions. In the real estate case a judgment was entered dismissing the suit on the merits and in the personal property case a money judgment was entered against Appellant for the amount of the tax ($6,157.43). Appellant appealed to the Supreme Court of Minnesota from both judgments. The two causes were briefed and argued together in that court and that court rendered a single opinion covering both cases and affirming both judgments.

Copies of the various opinions rendered in these proceedings are appended to this Statement as follows:

APPENDIX A—Opinion of Supreme Court of Minnesota in the present cases.

APPENDIX B—Memorandum of District Court of Wadena County, Minnesota, in the real estate case.

APPENDIX C—Memorandum of the District Court of Wadena County, Minnesota, in the personal property case.

APPENDIX D—Opinion of the Supreme Court of Minnesota in the Declaratory Judgment action.

The Federal Questions and the Rulings Thereon

Appellant's complaint in the real estate case, after alleging that all interests in the property had been subjected to the tax statutes of Minnesota, alleged as follows (R. 7-8):

"X

Chapters 273, 275, 279 and 280, Minnesota Revised Statutes, insofar as they purport to authorize, or if they be construed to authorize, the assessment, levy, tax judgment and tax sale alleged in paragraphs III, IV, V and VI hereof, and as said statutes have been construed and applied to said property by the taxing officials of the State of Minnesota and Wadena County as hereinbefore alleged, are in that respect and to that extent in violation of the Constitution of the United States and particularly Article VI, Clause 2, and Article IV, Section 3, Clause 2 thereof, and are in derogation of the sovereignty of the United States and are therefore invalid.

"XI

The action of the public officials hereinbefore in paragraphs III, IV, V and VI alleged and the resulting assessment, levy, tax judgment and tax sale are each an infringement of Plaintiff's rights under the Constitution of the United States, and particularly under the provisions thereof in paragraph X hereof referred to, and furthermore, constitute a taking of Plaintiff's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and therefore are null and void".

Except for the statutes referred to, the same allegations were contained in Appellant's answer in the personal prop-

erty case (R. 93-94). These were the sole issues raised by the pleadings and the sole issues briefed and argued in the District Court. That Court in deciding adversely to Appellant made no specific reference to those issues in either case.

The validity under the Federal Constitution of the tax statutes of Minnesota as applied to the property was drawn into question in the Supreme Court of Minnesota. The Rules of Practice of that Court provide that the brief of Appellant shall contain a statement of "Legal Issues or Questions Involved", which shall state the broad questions presented for decision.[1] Pursuant thereto Appellant submitted the following statement (R. 112):

"LEGAL ISSUES INVOLVED.

In the pleadings in both cases the Dairy Company asserted either: (a) the property is beyond the reach of the tax statutes of Minnesota; or (b) if such statutes be held to be applicable, they are to that extent repugnant to the Constitution of the United States and invalid. These are the issues in both cases. These issues have not heretofore been decided in either case.

"In the real estate tax case the trial court held that the previous decision of this Court in the Declaratory Judgment suit was not *res judicata*. The lower court's decision in the real estate tax case in effect was a holding that the property was within the purview of the

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[1] Rule VIII of the Rules of Practice of the Supreme Court of Minnesota provide:

"3. The brief of appellant shall contain:

* * *

(c) A concise general statement of the question or questions involved omitting unnecessary details. This rule is not satisfied by stating the question as it would be stated for an assignment of error. It should be stated as a court, after reading the record and briefs, would state the broad question which is presented for decision. Each question should be followed by a concise statement as to how the court below answered it, or modified the answer asserted by appellant to be the correct answer."

tax statutes of Minnesota, and such statutes as applied to the property did not violate the Federal Constitution. In the personal property tax case the lower court held that the decision of this Court in the Declaratory Judgment suit was *res judicata* of the issues involved in said case. The Dairy Company contends otherwise."

The issues as thus stated were fully argued in the briefs and orally before the Court.

The Federal questions considered by the Minnesota Supreme Court, and that Court's disposition of those questions, are as follows:

1. The Court sustained the tax in each case. It thereby upheld the validity of the tax statutes as applied to the property in question against Appellant's contention of violation of the Federal Constitution, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282.

2. Underlying the Court's decision that the tax and taxing statutes are valid, as applied, was the Court's conclusion that under the documents in evidence the interest of the Government in the property was that of mortgagee only, and that the equity was vested in Appellant. The Court said:

> "In case of an absolute sale, the property would have been immune from state taxes. * * * If, however, a mortgage was intended, the property was subject to state taxation * * *."

And again, as to the realty:

> "A state may constitutionally impose a nondiscriminatory tax upon the *interest of a mortgagor* in land the legal title to which is held by the United States *as mortgagee*, so long as the rights of the United States remain unaffected." (Italics supplied.)

And again, as to the personalty:

> "The question is whether one using property, *upon which the Government holds a mortgage*, to serve the

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> Government is immune upon Federal grounds from a personal property tax imposed upon him in personam. We think that this question is answered emphatically in the negative. * * *" (Italics supplied.)

From the opinion as a whole, it is apparent that had the Court taken the view that the Government was vested of the equity in the properties, it would have held the statutes invalid as applied.

The nature of the interest of the Government under the documents to which it was a party is a Federal question decided adversely to Appellant.

3. The Court referred to the land tax as being "subordinate" to the rights of the Government, saying of the tax: "Being subordinate to the rights of the Federal Government it neither affects nor impinges upon them."

This holding again is plainly founded on the concept that the interest of the Government in the property is that of mortgagee. The Court described the land tax as being *in rem*. Since the land tax was not expressly assessed or levied "subordinate" to the rights of the Government, but was assessed upon the property as a unitary item embracing all interests therein, the finding of subordination must be predicated upon the supposed limited nature of the Government's interest, otherwise there is no basis for such finding. If the equity was in the Government, as Appellant contends, and if in that situation the finding of "subordination" would still be applicable, nevertheless, the effect of the judgments is to sustain a real estate tax upon the lessee's interest in the land based upon the Government's equity and a personal property tax assessed against the lessee in personam based upon the Government's equity in the personalty, both of which are clearly in violation of the immunity doctrine of the Federal Constitution and the Fourteenth Amendment.

4. Although fully considering and deciding these Federal questions on their merits, erroneously, as Appellant contends, the Court also made incidental reference to a rule of practice. It is required by Minnesota statutes that the decision of the trial court shall be embodied in formal Findings of Fact and Conclusions of Law,[2] a requirement which was complied with by the trial court in this instance. The Findings of Fact consisted of a recital of the documents, they being the only evidence as to the transaction, and the levy and assessment of the taxes. All these facts were covered by stipulation. The trial court's conclusion of law was simply that Appellant was entitled to no relief. In the real estate case the trial court appended to its decision a Memorandum in which was discussed rather informally the views of the trial judge. In the course of this Memorandum the judge said:

> "It seems to me that the Warranty Deed given by the plaintiff herein to the United States is in reality a mortgage to secure the Government for the money it advances and for the faithful performance of the contract by the lessee."

And further observed:

> "The rights acquired by the state in such proceedings are subordinate to the right in the rem held by the United States Government."

On appeal to the State Supreme Court Appellant addressed its Assignments of Error to the trial court's Findings of Fact and Conclusions of Law, but did not refer specifically to the Memorandum. By way of interpretation of one of its rules of practice the Minnesota Court said:[3]

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[2] Minnesota Statutes, Annotated (1945), Section 546.27.

[3] The rule in question (Rule VIII 3(e) merely provides in respect to the contents of an appellant's brief that: "Errors assigned shall be separately and concisely stated and numbered, without repetition, and

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> "Facts stated in the trial court's Memorandum made part of its decision, which are *not inconsistent with facts specifically found,* become part of the findings * * *, and if unchallenged or if supported by the evidence are final on appeal." (Emphasis supplied.)

The Court then suggested that the above-quoted statements of the trial court in the Memorandum should be taken as final. The Court determined that these statements were *"not inconsistent with facts specifically found"*. This was the basis on which the Court invoked its rule of practice announced in this decision. The operation of the rule depended on the Court first determining that the statements were *consistent* with the specific findings. Here the trial court *specifically found* the execution and existence of all the documents to which the Government was a party upon which the interest of the Government depends. These documents constituted the whole of the specific findings as to the transaction. In deciding that the trial court's statements in the Memorandum were *"consistent"* with the specific findings, the State Supreme Court then and there necessarily construed and interpreted these documents, and decided for itself at that point that such statements were not in conflict with the documents.

That determination by the State Supreme Court involved determining a Federal question. Therefore the invoking of this rule cannot be regarded as an independent local ground of decision. If there be any element of a local question involved in the Court's interpretation and application of this rule of practice, it is so intermingled and involved in the Federal question as to be inseparable. Furthermore, what was said with reference to the rule had

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where a finding of fact is attacked as not sustained by the evidence, it shall be particularly specified." (Vol. 27 Minnesota Statutes Annotated, p. 580-581).

application only to the real estate case and not to the personal property case.

5. As to the personal property tax, the State Supreme Court also injected a further ground of decision, namely, that the judgment in the Declaratory Judgment suit was *res judicata* of the issues raised by Appellant's answer in the personal property case. As will be seen hereafter, this holding of *res judicata* should be deemed by this Court to be so plainly ill-founded that it cannot support the judgment on the personal property tax, and must be regarded as an evasion of the Federal question and a device to thwart review.

The Question Is One of Substance

The controlling question on this appeal is whether the equity in the property was vested in the Government. The tax statutes operated on the equity. That equity was the subject of both the real estate tax and the personal property tax, they each being the customary form of ad valorem general property tax based upon a full valuation of the property and embracing all interests therein. If the equity was in the Government, as contended by Appellant, the effect of the decision is to sustain the application of these statutes in taxing the Government's lessee for the Government's property interest. Even though the Government is not deprived of its property interest by these tax proceedings, which the Court states to be the case, nevertheless, the lessee is compelled to pay the taxes on the entire interests in the property or suffer deprivation of its lease and of its option to buy the property, and the lessee is subjected to a money judgment against it for a tax on the entire interests in the personal property. Appellant is not here defending the Government's interest, but Appellant is raising the constitutional issue whether it as

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lessee of the Government shall be taxed for the Government's property interest. From the time of *Van Brocklin* v. *Tennessee*, 117 U. S. 151, down to the present this Court has consistently held that a state may not use the Government's property interest as the subject of an ad valorem tax directed against private persons standing in relationship to that property.

Therefore the constitutional issue on this appeal involves the question whether the contract, deed and lease vested in the Government the equity in the property. The Court's conclusion that the equity was not in the Government was reached through its construction of these documents, they being the only evidence in the case relating to the property. The interpretation given to these instruments was the basis on which the validity of the statutes was upheld.

These instruments are not confined to this single transaction. They were formulated by the Government in connection with the Lend-Lease program. The Department of Agriculture undertook a large share of that program. These documents were drafted by the Government for use throughout the nation in securing plants for the furnishing of lend-lease articles. In the State of Minnesota alone thirteen milk plants were acquired by the United States under identical documents. The taxes on those plants would aggregate approximately $100,000 a year. Appellant is informed and believes that approximately the same number of plants were acquired by the Government under the same type of documents in each of several other dairy states in the Middle West, in the East and the Far West. This has reference only to dried milk plants, and it is common knowledge that other types of plants were acquired under similar arrangements. Appellant is involved at this time in proceedings pending in the State of Wisconsin

regarding taxability of a plant located in that state owned by the United States under identical documents.

Examination of the documents indicates clearly that the equity in the property was in the Government. The contract states explicitly that the Government is to "*purchase*" the facility for an agreed price. The contract referred to the Acts of Congress authorizing the acquisition and operation of such plants, and mentioned particularly authorization to acquire land (R. 9-10).[4] There would be no purpose in referring to the Congressional authority to acquire land nor to the requirement of approval of title

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[4] The contract cited the Lend-Lease Act, 55 U. S. Stat. 31-33 (22 U.S.C.A. 411-419) which provides in part as follows:

> "Section 412. Procurement. (a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—(1) to manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States."

It was stipulated by the parties that the contract was also made pursuant to the Defense Aid Supplemental Appropriation Act, 1941 (55 U. S. Stat. 53-55) which provides in part as follows:

> "To enable the President, through such departments or agencies of the Government as he may designate, to carry out the provisions of an Act to Promote the Defense of the United States, approved March 11, 1941, and for each and every purpose incident to or necessary therefor, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the following sums for the following respective purposes, namely:
>
> (a) For the procurement, by manufacture or otherwise, of defense articles for the Government of any country whose defense the President deems vital to the defense of the United States, including services and expenses in connection therewith, as follows:
>
> (6) Facilities and equipment for the manufacturing or production of defense articles, by construction or acquisition of land, and the maintenance and operation of such facilities and equipment —$752,000,000.00."

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by the Attorney General of the United States if it were not intended that the Government was to acquire the ownership of the property. The written opinion of the Attorney General is necessary only as to "purchases" of land by the United States (40 U.S.C.A. 255). Paragraph 3 of the contract provides that prior to conveyance each item shall be marked and stamped in a manner satisfactory to the Government to indicate the ownership thereof by the Government. This provision is consistent only with an intention that the Government is to be the owner of the property.

The Warranty Deed and Bill of Sale to the Government was absolute in form. The lease back to Appellant required the lessee to perform the covenants contained therein for the period of the war emergency or for five years, whichever was the sooner. After that it was optional with the lessee to continue the lease. It could cancel the lease at any time on ninety (90) days' notice. It was given an option to renew the lease for a second five years. It is important to observe that the lease was not to be assigned or the property to be sublet except with the consent of the Government.

As a part of the transaction there was given to Appellant an option to repurchase the property at any time after the war emergency and while the lease was in effect. Until it is exercised, the option is no more than a personal privilege of Appellant to buy the property from the Government for a designated price. This option was in the form of a defeasance clause in the deed, a form adopted to facilitate a reconveyance of the property without the necessity of Congressional action. The Government under no circumstances could compel a return of its investment beyond payment of rent for five years or for the duration of the war emergency, whichever was the shorter, which in no event would exceed fifty per cent of the option price. It

has been held by this Court that a privilege or option of buying land by paying a certain sum within a limited time does not vest in the optionee any interest or estate in the land until exercised, *Richardson* v. *Hardwick*, 160 U. S. 252, 254, and likewise a lessee-optionee acquires no interest in the property, *Helvering* v. *San Joaquin Co.*, 297 U. S. 496, 498-499.

This Court has made it clear that the construction of contracts to which the United States is a party shall be finally determined by it, not controlled by the law of any state. Furthermore, this Court reserves to itself the decision as to the real nature and subject matter of the tax where there is involved a Federal right. *United States* v. *Allegheny County*, 322 U. S. 174; *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 562.

The means employed by the Government in the execution of its Constitutional functions must be given effect according to their clearly expressed intent. In this instance the manifest intent of these documents was that the plant should be owned by the Government and leased to Appellant. Valid reasons existed for such arrangement. The Government needed dried milk in vast quantities. It was a comparatively new product requiring a single-purpose plant not good for any other use and costing at least $300,000.00 per plant. In essence the plant consisted of merely a shell built around expensive, specially designed equipment. The dairy industry could not afford to pay for the number of plants required by the Government because no one expected after the war that there would be demand for the product in the quantities required by the Government. Consequently the Government, in order to secure the number of plants that was needed, bought and paid for them as its own property and leased them to the companies which had the necessary milk supply in the adjacent area, with the privilege given to such companies to buy them back at any

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time within a period of years after the war if they should find it worth while to do so. That was advantageous to the Government because the plants would be of little value to anyone else.

Although this plan and intent of the transaction is apparent on the face of the documents, the Minnesota Court says it is a mortgage. The Court says the Government merely made an "advance" on the security of the property. Throughout its entire opinion the Court constantly refers to the property as Appellant's property. The Court's conclusion that the transaction was a loan is not derived from any evidence in the case whatsoever other than the documents themselves, which constituted the only proof presented. In several particulars the Court's opinion misstates the provisions of these documents.

This Court has held that a deed absolute in form and an agreement by the vendee to reconvey upon payment of a fixed sum within a specified time do not of themselves constitute a mortgage, *Wallace* v. *Johnstone*, 129 U. S. 58, *Bogk* v. *Gassert*, 149 U. S. 17.

There is contained in the lease a general covenant by the lessee to pay taxes *lawfully* assessed against the property (paragraph 12). With reference to similar covenants this Court has said that in the absence of Congressional consent they do not operate either to waive or create an immunity (*Allegheny* case, p. 189). In the instant case Congress has not consented to the subjection of this property to any form of state taxation.

The tax statutes applied to this property allow for no assessment of separate interests in the property. As to land, they operate *in rem* upon the land as a unitary item. As to personalty the owner is assessed for the entire interests in the property. The Minnesota Court in its decision here recognized this to be the case. In *S.R.A., Inc.* v.

Minnesota, 327 U. S. 558, this Court upheld a tax on land the legal title to which was in the Government, on the ground that the equity was in private hands and the tax as construed by the State Court did not reach or affect the Government's security interest. The Minnesota Court places chief reliance on the *S.R.A.* case. In holding that the tax proceedings against the land were "subordinate" to the Government's interest, the Court cited the *S. R. A.* case as the sole basis of such holding. Obviously this is predicated on first determining that the Government's interest is only a security interest, and the holding should be so regarded by this Court. Appellant, however, does not rest its appeal only on this contention. Even though the holding of subordination be regarded as applicable to the situation of the equity being in the Government, which appears untenable, nevertheless the effect of the judgments herein rendered is to validate the application of these tax statutes against the Appellant for the Government's property, in violation of the immunity doctrine of the Federal Constitution and the Fourteenth Amendment.

In *Lee* v. *Osceola Improvement District, supra*, benefit assessments were levied upon lands owned by private persons for improvements made some years previously when the lands were owned by the Government. The Court held such assessments to be invalid as an attempt to accomplish indirectly what could not be done directly against the Government. That is precisely what is being attempted in this case. Minnesota is attempting to collect personally against the lessee for the personal property tax and *in rem* against the lessee's interest in the land for the land tax, both of which taxes were based upon the Government's equity in the property.

No one can say whether Appellant will ever elect to buy this property. Only recently as respects another plant

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located at Fosston, Minnesota, which is owned by the Government under identical arrangements, Land O'Lakes Dairy Company gave notice of the cancellation of its lease. In that instance the company does not claim to have any interest in the property whatsoever, after the effective date of its notice of cancellation, and it is understood that the Government does not assert any claims personally against the company. Presumably the Government will sell that plant as surplus property. In May of 1947 that plant was sold to the State of Minnesota for nonpayment of taxes, and the sale will ripen into an absolute conveyance in May of 1950. Whatever may be the effect of the State's tax deed, at the very least it is certainly true that upon the Government's disposal of the property, someone will have to bring suit to remove the cloud on title. This situation illustrates the fact that these taxes really amount to no more than an attempt to exact from Appellant, personally and against its leasehold interest, taxes based on the Government's equity in the property. That is precisely what was held to be in violation of the Federal Constitution in *U. S.* v. *Allegheny County, supra.*

As to the personal property tax the Court put forth as an additional ground of decision a holding that the judgment in the Declaratory judgment suit was *res judicata* of the issues as to that tax. Appellant contends that the *res judicata* point is so plainly unfounded that it cannot support the judgment as to the personal property tax and should be regarded as an evasion of the Federal issue and a device to thwart review of the Federal question.

The previous action was a suit by Appellant for a declaratory judgment as to its claim of immunity under the Federal Constitution, wherein the Minnesota Supreme Court held that Appellant was not entitled to a declaratory judgment because of its having covenanted to pay taxes. The

Court used the covenant as the reason for refusing to exercise its discretion of granting a declaratory judgment. It did not consider the constitutionality of the tax statute or the tax as applied to Appellant. The trial court in that action sustained demurrers to the complaint on the ground that since plaintiff (Appellant here) had by provisions of the lease promised to pay the taxes, it was not entitled to any declaration as to the validity of those taxes, and upon that ground ordered a dismissal of the action (R. 68-71). The judgment of the State Supreme Court was to affirm this order of dismissal (R. 72-74). The previous action, therefore, did not result in determination of any substantive matter. The present action is a suit by the State against Appellant to collect the tax, which is a different cause of action, wherein Appellant asserted invalidity of the tax statute as a defense thereto.

Appellant did endeavor to obtain a review in the United States Supreme Court of the judgment in the former action, and in so doing expressed concern that the state court might hold such judgment to be *res judicata* of the Federal issue involved in this present action which had been commenced during the course of the former proceedings. The State in its opposition to the granting of certiorari contended that the judgment was not a final adjudication of any substantive Federal issue, and called attention to the pendency of the present action which it claimed did involve a Federal issue.[5] Certiorari was denied.

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[5] The State Attorney General on page 6 of his brief in opposition to granting certiorari said:

> "The Court does not hold that the property in question is taxable. The Court holds that while, generally, the validity of personal property taxes may be determined in an action brought under a state statute making available actions for Declaratory Judgment, in this case upon the specific facts here present, including the voluntary assumption by the petitioner of the payment of the tax, the Dairy

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Attention is directed to the last paragraph of the opinion in the present action, wherein the Minnesota Supreme Court took pains to make it clear that the reason given for declining to grant declaratory relief, namely the covenant to pay taxes, was not to be considered as a ground of decision of the merits of the Federal issue asserted in this action. Therefore, if the holding of *res judicata* is to stand as being the basis of determining the personal property case, it means Appellant has been denied a ruling on the merits of the Federal question it has here asserted.

This Court has said that the Constitution, which guarantees rights and immunities, likewise insures the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked, and it becomes the province of this Court to inquire whether the decision of the State Court may not have been an evasion and a bar to such privilege. *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282. See also *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 680-682; and *Hansberry* v. *Lee,* 311 U. S. 32, 40.

In a long line of decisions this Court has held that where a Federal right or immunity has been asserted and denied by a State Court, and that Court puts forth as a ground of its decision some local rule of law or practice, the appellant may invoke the determination of this Court as to whether there exists any substantial basis for the supposed local ground, or whether the latter constitutes an evasion of the Federal question and an attempt to bar adjudication of the claimed Federal immunity. *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Ward* v. *Love,* 253 U. S. 17, 22; *Union Pacific RR Co.*

Company is not entitled to a judgment determining the validity of the tax.

"In so holding, the state court is merely applying the well-settled principles of the law of Declaratory Judgment. The granting of Declaratory Judgment is a matter within the discretion of the Court."

v. *Public Service Commission*, 248 U. S. 67, 69, 70; and *New York Central* v. *New York and Pa. Co.*, 271 U. S. 124, 126. In the case of *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464, 474-476, a holding of *res judicata* by a State Court was found to be so plainly ill-founded as not to support the judgment.

The *res judicata* point put forth by the Minnesota Court is palpably an attempt to evade and bar adjudication of the Federal issue asserted in this case. Appellant sought by the method of declaratory judgment an adjudication of the Federal issue, and it was within the discretion of the State Court to grant or deny such judgment. For reasons of its own, not subject to review, the State Court decided that Appellant was not entitled to a judgment as to its claim of Federal immunity. The attempt of that Court to make use of that decision as a bar to adjudication of the Federal issue asserted in the present action must be taken as an evasion of constitutional obligations. Precisely as in the case of *Postal Telegraph Cable Co.* v. *Newport, supra*, the res judicata point must be held so clearly ill-founded that it cannot support the judgment.

Conclusion

There was drawn into question in these cases the validity of the tax statutes as herein applied. In sustaining the taxes the Minnesota Supreme Court thereby upheld the validity of the statutes on the ground that the transaction was a mortgage, such holding being founded in all respects on that Court's construction of the documents. Appellant contends that under Federal law, which must prevail as respects construction of these documents, the equity in the property was in the Government. The decision as it stands will mean that Appellant must pay taxes calculated and imposed upon all interests in the property or face the consequences of a forfeiture of its lease and a personal judgment

against it for the personal property tax. Upon a proper construction of the documents such a result is in violation of the immunity doctrine of the Constitution and the Fourteenth Amendment.

For these reasons the Supreme Court of the United States has jurisdiction to review on appeal the judgments rendered in these cases, and should exercise such jurisdiction.

Respectfully submitted,

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APPENDIX A

No. 99

WADENA COUNTY

34955

LAND O'LAKES DAIRY COMPANY, *Appellant,*

vs.

COUNTY OF WADENA and STATE OF MINNESOTA, *Respondents.*

34956

STATE OF MINNESOTA, *Respondent,*

vs.

LAND O'LAKES DAIRY COMPANY, *Appellant.*

Endorsed: Filed July 22, 1949. Grace Kaercher Davis, Clerk, Minnesota Supreme Court.

PETERSON, *J.*

SYLLABUS

1. A mortgage of either realty or personalty is a conveyance intended as security for the payment of money, or the performance of some act.

2. Where the real nature of the transaction is a loan upon the security of real estate, it is a mortgage, even though the loan is made wholly upon the security and without any personal obligation on the part of the borrower.

3. A real estate tax is one *in rem* against real property without personal liability therefor on the part of the owner thereof, and a judgment recovered in proceedings for the enforcement of such a tax likewise is one *in rem* against the property without personal liability against the owner; and a personal property tax is not one upon such property, but rather one *in personam* against the owner because of his

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ownership of such property and measured by the value thereof.

4. Facts and conclusions stated in the trial court's memorandum made part of its decision, which are not inconsistent with facts specifically found and the conclusions specifically made, become part of the decision, and if such facts are supported by the evidence, or if the facts and the conclusions are unchallenged, they are final on appeal.

5. A state may constitutionally impose a nondiscriminatory tax upon the interest of a mortgagor in land, the legal title to which is held by the United States as mortgagee, so long as the rights of the United States remain unaffected.

6. One using property, upon which the Government holds a mortgage, to serve the Government is not immune upon Federal grounds from a personal property tax imposed upon him in personam.

7. A judgment that one is not immune from a personal property tax upon Federal grounds is *res judicata* of the question in a subsequent action.

Affirmed.

OPINION

PETERSON, *Justice:*

These two appeals were heard together. One is from a judgment denying an injunction enjoining the enforcement of a judgment recovered by the state against real property of the Land O'Lakes Dairy Company (herein referred to as the "dairy company") for real estate taxes for the year 1945. The other is from a judgment recovered by the state against the dairy company for personal property taxes for the year 1945.

The questions for decision are:

(1) Whether a transaction between the government of the United States and a contractor constitutes a mortgage, where the transaction is evidenced by three written instruments, viz.: A contract, a lease, and a combined warranty deed and bill of sale, which provided in effect that the contractor should acquire land,

erect thereon a building and equip it for manufacturing a product to be used for national defense; that, after having completed the erection and equipment of the facility mentioned, the contractor should convey and transfer title thereto to the government for a purchase price to be determined in the manner provided by the contract upon condition subsequent that the title should *revert* to the contractor upon payment by it, after the President had declared the facility to be no longer needed for defense purposes and while the lease or an extension thereof was in force, of an amount equivalent to the purchase price paid by the government less depreciation of the property computed according to contractual formula; that during the life of the lease the contractor should pay a stipulated rental for occupation and use of the facility; that upon payment of such sum the government would execute written instruments to evidence the reversion of the title; and that, if such payment was not made, the title vested in the government by the warranty deed and bill of sale should become indefeasibly vested in it;

(2) Whether, if such a transaction constitutes a mortgage, the property is immune from state taxation because of the federal government's ownership of an interest therein as mortgagee; and,

(3) Whether a declaratory judgment, determining that the mortgagor was liable as against the claim of federal immunity from taxation for a personal property tax based on its ownership of personal property, is *res judicata* in a proceeding to enforce payment of personal property taxes of the question whether the mortgagor is liable for such taxes as against the defense of federal immunity therefrom.

Pursuant to authority granted by 22 USCA, §§ 411-419 (Lend-Lease Act), and 55 U. S. Ct. 53-55 (Defense Aid Supp. Appropriation Act, 1941), the government arranged with the dairy company to have it acquire and operate a milk processing plant for manufacturing nonfat dry milk solids or such other products as might be specified by the govern-

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ment, which were to be first offered for sale to it. The transaction was evidenced by three writings, viz., a contract, a lease, and a combination warranty deed and bill of sale.

The contract (dated June 9, 1944), so far as here material, provided that the dairy company should acquire, if it was not the owner thereof (and it was stipulated that it was not), a tract of land upon which to erect the processing plant; that the dairy company should construct thereon at its own expense the processing plant and equip it according to the government's plans and specifications; that the dairy company should also equip certain creamery receiving stations in the trade area surrounding the plant; that the dairy company, after it had constructed and equipped such property, which it was agreed was to be referred to as the "facility", should convey and transfer title thereto to the government; and that the government should pay the dairy company a price therefor to be determined according to the contract, which afterward was agreed to be $415,285.51. The contract provided that "title to the facility shall however, be subject to the following condition to be provided for, substantially, in each instrument of title or conveyance," viz., that if the President of the United States should declare that the facility was no longer needed for defense purposes and the dairy company should during the lease or a continuation thereof pay a sum of money to the United States equivalent to the total consideration paid by the government for the facility, not including the cost of the land, less an annual depreciation of ten percent thereof, title to the facility should "revert" to the dairy company, but that the government should not be responsible for the condition or state of repair of the facility at the time title thereto "reverts" to the dairy company. It was further agreed that "upon the reverting of the title" as aforesaid the government should execute and deliver to the dairy company written instruments "to evidence the happening of the reversion of title"; that, should the dairy company fail to make the payment within the time specified, "said condition subsequent shall be null and void," and title to the facility "then vested in the Government shall be indefeasible." It was also provided that the dairy company should pay for documentary revenue stamps and filing and recording fees, and that it should bear

loss caused by fire prior to the acceptance of the facility by the government.

Simultaneously (on June 9, 1944), the government executed a written lease of the facility to the dairy company for a term of five years for the purposes stated in the contract, reserving an annual rental equivalent to 11 percent of the total consideration paid for the facility. Under the lease, the dairy company was obligated to offer for sale to the government all products processed in the facility; to keep the facility insured at its own expense against loss by fire and other hazards to be specified; and to pay, at least ten days prior to delinquency, "all taxes assessed or other governmental charges that may be legally imposed upon or constitute a lien against the facility or any part thereof." There were covenants against subleasing and subletting by the dairy company. The dairy company was granted the right to renew the lease, as follows: (1) If the President had not made the declaration mentioned and if the lease was still in force, to renew it for another term of five years upon the same terms and conditions as those contained in the original lease; and (2) if at the end of such renewal period the President had not made such declaration and if the lease as renewed was still in force, to renew it for another term of ten years upon the same terms, etc., except that the rental was to be $10 per month. The lease contained provisions authorizing the government to terminate the lease as renewed.

On November 24, 1945, the dairy company, in consideration of $415,285.51, of which $322,810.24 represented the purchase price of the land and the cost of the buildings, including permanent fixtures and installations, by a combination warranty deed and bill of sale conveyed the facility to the government, subject to the condition subsequent, which by the terms of the contract was to be included in the deed and bill of sale and which was set forth therein substantially in the language of the contract.[6]

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[6] The condition contained in the deed and bill of sale, so far as here pertinent reads:

"PROVIDED, HOWEVER, That if, after the date of a declaration by the President of the United States of America, that the above

By amendments to the contract and the lease executed on November 6, 1945, it was agreed, among other things, that title to the facility should be considered as having vested in the government on April 1, 1945; that the term of the lease should be considered as commencing on April 1, 1945; and that the provision of the lease obligating the dairy company first to offer to the government products processed in the facility be deleted.

The dairy company has been at all times in possession of the facility and has operated it ever since it became capable of use.

On July 31, 1946, the President made a declaration that the government no longer needed the facility for defense purposes.

The dairy company has not exercised its right to terminate the lease and to pay the amount due the government in order to obtain a reversion to it of the title which it conveyed to the government.

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described premises and said machinery, equipment and personal property are no longer needed" for defense purposes "and at any time during the life of a lease between the parties hereto," or "of any extension or renewal" thereof, the dairy company shall pay to the government "a sum of money to be determined as hereinafter provided, the title to" the facility "shall revert" to the dairy company, which sum to be so paid shall be as follows: "The above stated total consideration paid [$415,285.51]" by the government to the dairy company for the facility "less an amount representing depreciation, obsolescence and loss of value due to use of said premises and of said machinery, equipment and personal property for national defense purposes, which said amount shall be calculated at the rate of ten (10) per cent per annum, commencing April 1, 1945, of the total consideration first above stated, less the consideration paid the said party of the first part for the land described herein without improvements, which amount represents Three Thousand Two Hundred Two and 76/100 Dollars ($3,202.76)"; and

The government shall not be responsible for the condition or state of repair of the facility "at the time title thereto *reverts*" to the dairy company, and the dairy company "shall accept" the facility "in the condition in which" it then is. The dairy company "covenants that if it fails to make payment of the sum of money as provided within the time above prescribed, *such condition subsequent* shall become of no force and effect and the fee simple title to" the facility *"hereby vested in the said party of the second part [government] shall then become indefeasibly vested in the said party of the second part."* (Italics supplied.)

Pursuant to M. S. A. cc. 273 and 275, a real estate tax for the year 1945 amounting to $3,249 was assessed against the real estate in question, effective as of May 1, 1945 (May 1 is the tax day), and a personal property tax for the year 1945 amounting to $6,143.33 was assessed against the dairy company effective as of May 1, 1945, based upon its ownership of machinery and equipment in its plant located in the village of Sebeka.

Thereafter, the dairy company commenced a declaratory judgment action to have determined whether it was liable for the taxes in question. The district court sustained demurrers to the complaint upon the ground that, while a taxpayer has a right in such cases to maintain an action for a declaratory judgment to have determined its liability for both real property and personal property taxes, the dairy company upon the merits was liable for the taxes in question. On appeal, we affirmed so far as the order concerned the dairy company's liability for the personal property tax and reversed so far as it concerned its liability for the real estate tax. Land O'Lakes Dairy Co. v. Village of Sebeka, 225 Minn. 540, 31 N. W. (2d) 660. The reversal was upon the ground that the remedy by declaratory judgment was not available to the dairy company to determine its liability for real estate taxes because c. 278 provides the *exclusive remedy* for contesting real estate taxes. Thereafter, pursuant to the mandate of this court, judgment was entered in the district court to the effect that the dairy company was entitled to no relief from the personal property taxes and that the declaratory judgment action be dismissed so far as it related to the real estate taxes, upon the ground that such action could not be maintained by it.

Subsequently, judgment was entered in the proceedings to enforce payment of real estate taxes for the year 1945 against the real property for the amount of the real estate tax then due. Pursuant to the judgment, the real estate was bid in at the tax sale for the state of Minnesota. There has been no redemption from the sale, nor any assignment or transfer by the state of its rights as purchaser at the sale. It is the enforcement of the tax judgment which the dairy company seeks to have enjoined. The district court found

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as a fact that the assessment embraced "without qualification all interests in said [the dairy company's real] property," and as a conclusion of law that the dairy company was not entitled to any relief. In a memorandum made part of its decision, the court found that the warranty deed was "in reality a mortgage to secure the Government for the money it advances and for the faithful performance of the contract by the lessee [the dairy company]" and that "The rights acquired by the state in such proceedings are *subordinate* to the rights in the rem [*sic*] held by the United States Government." (Italics supplied.) No assignments of error thereon have been made in this court. The dairy company appeals from the judgment entered pursuant to the court's findings and conclusions.

In answer to the citation in the proceedings to enforce payment of the 1945 personal property taxes, the dairy company pleaded that the government owned the property for which it was taxed and that the government was immune from such a tax. The state asserted that the declaratory judgment, which was shown by stipulation, was *res judicata* of the dairy company's tax liability, and the trial court so held. In its memorandum it indicated that, aside from *res judicata,* it would have held the dairy company liable for the tax, upon the grounds that the relation between the dairy company and the government was that of a mortgagor and mortgagee and that governmental immunity from taxation had no application under the circumstances.

Briefly, the dairy company contends that the transaction constituted a sale and a lease back. The state contends that the transaction was a mortgage, for the reason that, while the instruments used to evidence it were in the conventional form of a contract, lease, and deed and bill of sale, in substance the transaction was one under which the government was to advance the money for the construction and equipment of the facility and take title thereto as security for not only the money advanced but also for performance by the dairy company of its contract to manufacture war material, and that the terms of the condition subsequent under which title was to *revert* to the dairy company is not only indicative of intention to mortgage, but is the conven-

tional way of doing so. The dairy company, answering this contention, contends that there was no mortgage because there was no debt and no personal liability on its part to pay a debt. The state counters that neither a debt nor personal liability to pay one is necessary—that the advance may be wholly upon the security without personal obligation on the part of the borrower.

1. A mortgage of realty is a conveyance of realty intended as security for the payment of money, or the performance of some act. Lundeen v. Nyborg, 161 Minn. 391, 201 N. W. 623; Buse v. Page, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95; Madigan v. Mead, 31 Minn. 94, 16 N. W. 539 (money advanced). The conventional form of a mortgage is a conveyance absolute, defeasible upon the happening of a condition subsequent such as the payment of money or the performance of some act. Ozmun v. Reynolds, 11 Minn. 341 (459); Pace v. Chadderdon, 4 Minn. 390 (499); 4 Dunnell, Dig. & Supp. § 6145; 59 C.J.S., Mortgages, § 1. The language usually employed is such as is used in a deed for a conveyance absolute, but with an added provision that upon payment of the debt or performance of the act, "then this deed shall be void"; but an equivalent expression of defeasance is sufficient. I Jones, Mortgages (8 ed.) Sec. 87, and the cases there cited.

A chattel mortgage is a conveyance of personalty intended as security for the payment of money, or the performance of some act. Thoen v. First Nat. Bank, 199 Minn. 47, 271 N. W. 111; First Nat. Bank v. Flynn, 190 Minn. 102, 250 N. W. 806, 92 A. L. R. 1272; Ash Creek State Bank v. Zwart, 158 Minn. 100, 195 N. W. 935; Scofield v. National Elev. Co., 64 Minn. 527, 67 N. W. 645; Moore v. Norman, 43 Minn. 428, 45 N. W. 857, 19 A. S. R. 247, 9 L. R. A. 55; Merrill v. Ressler, 37 Minn. 82, 33 N. W. 117, 5 A. S. R. 822; 1 Dunnell, Dig. & Supp. Sec. 1424. Like a mortgage of realty, a chattel mortgage ordinarily is in form an absolute conveyance defeasible upon the happening of a condition subsequent, such as the payment of money or the performance of an act. Thus, it is clear that the same rules govern in determining whether a conveyance of either realty or of personalty is in fact a mortgage.

We think that the combined warranty deed and bill of sale here is in form and substance a mortgage of both realty and of personalty. It contains all the elements of one. It contains language of absolute conveyance. The conveyance is expressly made upon condition subsequent, so denominated therein, that it shall be void upon payment of money by the dairy company, whose right to do so was conditioned by keeping the lease in force and by performance of its contract to manufacture the war material mentioned. Both the contract and the deed refer to the title conveyed by the dairy company to the government as a *defeasible* one. This is plain from the clause that the title vested in the government shall become *indefeasibly* vested in it upon the dairy company's default. The covenants binding the dairy company to repair, to insure, and to pay taxes are such as are ordinarily included in a mortgage or a contract for deed. If an absolute sale as distinguished from a mortgage was intended, the covenant binding the dairy company to pay taxes was just so much surplusage and consequently meaningless. In case of an absolute sale, the property would have been immune from state taxes, and, consequently, federal government immunity from state taxation without the covenant would have afforded the federal government adequate protection against the taxes in question. If, however, a mortgage was intended, the property was subject to state taxation (see *infra*); and in that event a covenant such as we have here was necessary to afford the government protection against such taxes. The covenant can be given effect only by holding that a mortgage was intended. The fact that such a covenant was made is a token of intention to mortgage rather than to convey absolutely and indefeasibly. It seems clear also that the government intended to advance to the dairy company the money necessary to construct and to equip the facility and to hold title thereto as security for the money advanced and the dairy company's performance of the contract; that the government did not intend to acquire the facility to hold it permanently; and that, when the purposes of the government had been achieved, it intended to return the facility to the dairy company upon payment of the balance of the money due.

While the language of the condition subsequent is not that the deed shall become void upon the happening of the condition, but is rather that upon the happening thereof the title acquired under the deed shall "revert" to the dairy company, the language of the condition is equivalent to a declaration that upon the happening thereof the deed shall become void. The word "revert," as used in the condition subsequent, means that upon performance of the condition title shall go back to the dairy company. See, *Bybee v. Oregon & California R. Co.*, 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305; Reaney v. Wall, 134 Conn. 663, 60 A. (2d) 505. That, of course, means that when the deed shall become void. It is expressive of mortgaging as we defined it in Palmer v. Mutual L. Ins. Co., 114 Minn. 1, 6, 130 N. W. 250, 252, Ann. Cas. 1912B, 957, where we said:

> "• • • A chattel mortgage is a present transfer of title to the mortgaged property, with a defeasance. Upon the payment of the debt or the performance of the obligation secured, the title to the property *reverts* to the mortgagor." (Italics supplied.)

To the same effect: In re Herkimer Mills Co. Inc. (D. C.) 39 F. (2d) 625.[7] The word *revest* is sometimes used to express the same thought. Comron v. Standland, 103 N. C. 207, 9 S. E. 317, 14 A. S. R. 797; In re Ulrop-Huff Co. Inc. (D. C.) 9 F. (2d) 922 (reinvest)

A sale and lease back, even though there is no provision for defeasance of title upon performance of stipulated conditions, will be treated as a mortgage where it appears that the conveyance was for security for a debt or for the performance of an act. Helvering v. F. & R. Lazarus & Co., 308 U. S. 252, 60 S. Ct. 209, 84 L. ed. 226. See, Cary, *Corporate Financing Through the Sale and Lease back of Property; Business, Tax, and Policy Considerations*, 62 Harv. L. Rev. 1; Cary, *Sale and Lease-Back of Corporate property*, 27 Harv. Bus. Rev. 151.

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[7] See, In re A. Roth Co. Inc. (7 cir.) 118 F. (2d) 156; *Pearce* v. *Wilson* 111 Pa. 14, 2 A. 99; *Wisconsin Cent. R. Co.* v. *Wisconsin River Land Co.* 71 Wis. 94, 36 N.W. 837.

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Whether a transaction between the United States and a war contractor is a mortgage is to be determined by the rules stated. In cases arising under contracts let during World War I, where a transaction was not in the form of a mortgage, but was in substance one as security for the payment of money or the performance of an act, the federal courts held the transaction to be in effect a mortgage. United States v. Shelby Iron Co., 273 U. S. 571, 47 S. Ct. 515, 71 L. ed. 781; Virginia Shipbuilding Corp. v. United States (4 Cir) 22 F. (2d) 38. The cited cases are not only authority for the application to war contracts of the rules stated for determining whether a particular transaction is a mortgage, but persuasive that the transaction here is in fact such.

We hold that the transaction here is a mortgage under the rules stated.

2. Where the real nature of the transaction is a loan upon the security of real estate, it is a mortgage, even though the loan is made wholly upon the security and without any personal obligation on the part of the borrower. Hewitt v. Baker, 222 Minn. 292, 24 N. W. (2d) 47; 4 Dunnell, Dig. & Supp. Sec. 6154. The Hewitt case reviewed our prior decisions. The dairy company's contention to the contrary cannot be sustained.

3. In determining whether the dairy company's property is clothed with federal immunity from the taxes in question, it is necessary to consider the nature of such taxes.

A real estate tax is one *in rem* against real property without personal liability therefor on the part of the owner thereof, and a judgment recovered in proceedings for the enforcement of such a tax likewise is one *in rem* against the property without personal liability against the owner. Wilking v. County of Chippewa, 225 Minn. 425, 31 N. W. (2) 437; In re Petition of S. R. A., Inc., 213 Minn. 487, 7 N. W. (2d) 484; State v. Weyerhauser, 68 Minn. 353, 71 N. W. 265; 6 Dunnell, Dig. Secs. 9114A, 9281, 9353.

A personal property tax is not one upon such property, but rather one *in personam* against the owner because of his ownership of such property and measured by the value

thereof. In re Petition of S.R.A., Inc., supra; State ex rel. Vossen v. Eberhard, 90 Minn. 120, 95 N. W. 1115; 6 Dunnell, Dig & Supp.; Sec. 9263. As said in State ex rel. Vossen v. Eberhard (90 Minn. 123, 95 N. W. 1116) *supra:*

> "• • • The proceeding for the collection of taxes upon personal property is one in personam, and not in rem. This radical distinction must be kept in mind: In the one case the tax is against the person, although estimated in amount according to the value of the personal property possessed, and is never a lien upon the property assessed; in the other the tax is against the land, and becomes a lien thereon, but is never made a personal obligation against the owner. The state has no claim upon the personal property assessed, and it may be disposed of by the owner without regard to its assessment for taxes."

While personal property taxes are not a tax upon property and the tax is imposed upon the owner thereof *in personam*, such taxes are, by virtue of M. S. A. 272.50, a lien upon the property, because of which the owner is taxed. Both real and personal property taxes are nondiscriminatory. See, Minnesota v. Blasius, 290 U. S. 1, 54 S. Ct. 34, 78 L. ed. 131.

4. Facts stated in the trial court's memorandum made part of its decision, which are not inconsistent with facts specifically found, become part of the findings (Wilson v. Davidson, 219 Minn. 42, 17 N. W. (2d) 31), and if unchallenged or if supported by the evidence are final on appeal (Sime v. Jensen, 213 Minn. 476, 7 N. W. (2d) 325). Likewise, findings and conclusions not assigned as error on appeal are final. In re Estate of Olson, 227 Minn. 289, 35 N. W. (2d) 439; Alexander Pickering & Co. v. Chinese American C. S. Assn. (9 Cir.) 71 F. (2d) 895. So here, the statements in the memorandum made part of the trial court's decision in the injunction case, to the effect that the transaction between the government and the dairy company was a mortgage and that the rights acquired by the state in the proceedings to enforce payment of the real estate taxes were "subordinate" to those of the government in the real

estate, are to be taken here as final. They are not only not inconsistent with the facts specifically found and the conclusions made, but they also explain why such specific findings and the conclusions were made.

5. A state may constitutionally impose a nondiscriminatory tax upon the interest of a mortgagor in land, the legal title to which is held by the United States as mortgagee, so long as the rights of the United States remain unaffected. S. R. A., Inc. v. Minnesota, 327 U. S. 558, 66 S. Ct. 749, 90 L. ed. 851 (affirming 219 Minn. 493, 18 N. W. (2) 442; 219 Minn. 517, 18 N. W. (2d) 455). There, the question was whether the interest of a vendee under a contract to purchase real estate from the government was immune from a real estate tax imposed by this state, where the interests of the government were unaffected by the tax. It was there held that the purchaser, as vendee, was the equitable owner of the land; and that the government, as vendor, held the legal title only as security for performance of the contract by the vendee; and that the relation of the parties was in substance the same as that existing between a mortgagor and mortgagee. In the second S. R. A. case we said (219 Minn. 515, 18 N. W. (2d) 454):

> "Any difference between a security right obtained under a mortgage and that provided for by the retention of the legal title under an executory sales contract is a matter of form only and not of substance."

We in effect so held in the first S. R. A. case (213 Minn. 487, 7 N. W. (2d) 484).

The Supreme Court of the United States adopted this view. After pointing out that such a tax did not "impinge" upon federal rights, the Court said (327 U. S. 566, 569, 66 S. Ct. 754, 756, 90 L. ed. 858, 860):

> "• • • The possibility of repossession by the United States is not enough to block a tax sale in which the paramount rights of the United States are protected."

and—

> "• • • Where beneficial interest has passed to a vendee, the retention of legal title does not give a sig-

> nificant difference from the situation of a deed with a lien retained or a *mortgage* back to secure the purchase money" (Italics supplied.)

Here, because the transaction is in fact a mortgage, it comes squarely within the reasons for the rule announced by both the Supreme Court of the United States and by us in the S. R. A. cases.

It makes no difference that the mortgagee or vendee has not paid the money due to the United States or demanded a deed. It is sufficient for present purposes at least that he has a right to do so upon making payment, even though he has not done so. S. R. A., Inc. v. Minnesota, 327 U. S. 558, 66 S. Ct. 749, 90 L. ed. 851, *supra*, citing New Brunswick v. United States, 276 U. S. 547, 48 S. Ct. 371, 72 L. ed. 693.

The fact that the property is "owned by a private person and used by him in performing services for the Federal Government" does not render it immune from nondiscriminatory state ad valorem taxes. Oklahoma Tax Comm. v. Texas Co., — U. S. —, — S. Ct. —, 93 L. Ed. (Adv. Sheets) 556, 561.

The fact that the entire real property was assessed for the tax is no ground for holding that the property is immune from the tax upon federal grounds. This contention was answered by the Supreme Court of the United States in the S. R. A. case in the following language (327 U. S. 570, 66 S. Ct. 756, 90 L. ed. 860):

> "The only other contention of petitioner which we need mention is that the State has included the interest of the United States in the valuation of the land, and has therefore subjected that interest to taxation. But no deduction need be made for the interest of the Government since that interest is for security purposes only and is not beneficial in nature. The whole equitable ownership is in the petitioner and the value of that ownership may be ascertained on the basis of the full value of the land."

The dairy company cites contrary, among other cases, those of Van Brocklin v. Tennessee, 117 U. S. 151, 6 S. Ct.

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670, 29 L. ed. 845, and United States v. County of Allegheny, 322 U. S. 174, 64 S. Ct. 908, 88 L. ed. 1209 (commonly known as the Mesta case). These cases are not in point. The Supreme Court of the United States distinguished both of them in the S. R. A. case (327 U. S. 567, 66 S. Ct. 755, 90 L. ed. 858-859). We distinguish the Mesta case in the S. R. A. case (219 Minn. 496, 18 N. W. (2d) 445). We do not deem it necessary to repeat here what was there so well said.

It follows here that the dairy company's interest in the property taxes (real estate) is not immune from state taxation upon the grounds of federal immunity. The tax in question is nondiscriminatory. Being subordinate to the rights of the federal government, it neither affects nor impinges upon them. See, In re Petition of S. R. A., Inc., 219 Minn. 493, 18 N. W. (2d) 442, and *Id.* 213 Minn. 487, 7 N. W. (2d) 484, *supra.*

6. Personal property taxes, being only in personam and not against the property, have no effect upon the property, except where the state attempts to enforce its lien therefor against the property. The taxpayer's tax liability and the state's lien rights against the particular property involve separate questions. At this stage of the proceedings only the liability of the taxpayer for the tax is involved. Since the tax may be collected out of the taxpayer's other property, it may never become necessary to resort to the property on the ownership of which the tax is based. The question is whether one using property, upon which the government holds a mortgage, to serve the government is immune upon federal grounds from a personal property tax imposed upon him in personam. We think that this question is answered emphatically in the negative by the Oklahoma Tax Comm. case, *supra*, and the numerous decisions of the Supreme Court of the United States there cited.[8]

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[8] See, *Penn Dairies, Inc.* v. *Milk Control Comm.* 318 U. S. 261, 63 S. Ct. 617, 87 L. Ed. 748, where it was held that milk, produced in Pennsylvania for use by the armed forces during World War II and purchased under war procurement contracts, was not exempt from local regulation of the business of producing milk.

7. No reason occurs to us why the judgment in the declaratory judgment action, that the dairy company is liable for the personal property tax notwithstanding its claim of federal immunity therefrom, is not *res adjudicata* here of its liability for such tax. We hold that it is. The fact that the declaratory judgment determined a federal question does not render it any less a bar. Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. ed. 832; Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522, 51 S. Ct. 517, 75 L. ed. 1244.

In conclusion, we hold that the dairy company's interest in the land is subject to the real estate tax in question and that it is liable in personam for the personal property tax in question. We reach this conclusion without considering whether the dairy company's covenant to pay taxes created such a liability. The liability is independent of the covenant. This disposes of the questions raised on the appeals. It follows that there should be an affirmance in both cases.

Affirmed.

APPENDIX B

STATE OF MINNESOTA,
County of Wadena:

DISTRICT COURT, SEVENTH JUDICIAL DISTRICT

LAND O'LAKES DAIRY COMPANY, *Plaintiff,*

vs.

THE COUNTY OF WADENA AND STATE OF MINNESOTA,
Defendants

MEMORANDUM

There is no express provision of the United States Constitution prohibiting the states from taxing property of the Federal Government. The theory that such taxation is impliedly prohibited, on the ground that the exercise of such power might in time destroy the Union, ought not to control where the welfare of the Union does not impera-

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tively require it. The Congress should be the one to determine whether such prohibition is necessary or advisable. The interpretation given an Act of Congress by its administrative officers charged with its execution ought not to be reversed at the suit of a private party who has acquired property under the interpretation thus given, unless such interpretation is wholly arbitrary and unreasonable.

The covenant to pay the taxes, as contained in plaintiff's so-called lease, is of the essence of the contract. It is a part of the consideration agreed to be paid by the lessee.

The welfare of the nation demands that the states remain strong, and they cannot remain strong if their power to tax be unnecessarily interfered with. If unduly interfered with, they cannot survive. In times of war the financial burdens of the states increase along with those of the Federal Government and demand that their powers of taxation be not cut off. The provision in the lease obligating the plaintiff to pay the taxes on the leased property I believe is not arbitrary or unreasonable.

It seems to me that the warranty deed given by the plaintiff herein to the United States is in reality a mortgage to secure the Government for the money it advances and for the faithful performance of the contract by the lessee. The lessee has the right to redeem the property as a matter of right by repaying what the Government has advanced.

The real estate tax proceedings are proceedings in rem. The proceedings do not result in any personal judgment against the lessee or against the owner of the land. The rights acquired by the state in such proceedings are subordinate to the rights in the rem held by the United States Government. A somewhat similar situation arises in the taxation of lands held by a private owner but in which land the state holds mineral rights. Failure to pay the taxes would undoubtedly give the United States the right to declare a default in the conditions of the mortgage and to require the lessee to pay the taxes in order to redeem from the foreclosure.

As I construe Minnesota Statutes Annotated 273.19, the property was taxable as the property of the plaintiff irrespective of the covenant in the lease under which it is

in possession of the property, and it appearing that the tax has never been paid, plaintiff has shown no grounds for relief.

This memorandum is hereby made a part of this decision.

D. M. CAMERON,
District Judge.

APPENDIX C

STATE OF MINNESOTA,
County of Wadena:

DISTRICT COURT, SEVENTH JUDICIAL DISTRICT

STATE OF MINNESOTA, *Plaintiff,*

vs.

LAND O'LAKES DAIRY COMPANY, *Defendant*

MEMORANDUM

The transaction between the United States and the Land O'Lakes Dairy Company creates the relation of mortgagor and mortgagee. The warranty deed and bill of sale given by defendant to the United States were evidently given to secure the United States for the money it advances and for the faithful performance of the contract by the lessee. The lessee under the contract can redeem the property by repaying the amount owing under the contract. Failure to pay the taxes would undoubtedly give the United States the right to declare a default in the conditions of the mortgage and to require the lessee to pay the taxes in order to redeem from the foreclosure.

The covenant to pay the taxes, as contained in defendant's so-called lease, is of the essence of the contract. It is a part of the consideration agreed to be paid by the lessee. The authority under which the transactions between the United States and the Land O'Lakes Dairy Company were entered into is nothing less than an Act of the Congress. The interpretation given an Act of Congress by

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its administrative officers charged with its execution ought not to be reversed at the suit of a private party who has acquired property under the interpretation thus given, unless such interpretation is wholly arbitrary and unreasonable. The provision in the lease obligating the defendant herein to pay the taxes on the leased property I believe is not arbitrary or unreasonable.

Were the issue of res adjudicata out of the case, defendant nevertheless has failed to establish a defense to the payment of the taxes.

D. M. Cameron,
District Judge.

APPENDIX D

IN SUPREME COURT OF MINNESOTA

Land O'Lakes Dairy Company

v.

Village of Sebeka and Others

March 12, 1948

Frank T. Gallagher, *Justice:*

Appeal from an Order Sustaining the Demurrers of Defendants to the Amended Complaint

This is an action by Land O'Lakes Dairy Company, a corporation, hereinafter called the dairy company, against the Village of Sebeka and others, under the declaratory judgments act, praying that certain property, consisting of a milk dehydration plant in the village of Sebeka and personal property connected therewith, the adjudged exempt from taxation as belonging to the United States.

The facts stated in the complaint are substantially the same as those in Land O'Lakes Dairy Co. v. County of Douglas, 225 Minn. 535, 31 N. W. (2d) 474, filed herewith. Since the appeals are contemporaneous, they are treated as companion cases.

The dairy company assigns as error that the court erred in sustaining the demurrers to its amended complaint.

On May 1, 1945, and again on May 1, 1946, the real and personal property of which the plant consisted was listed and assessed for tax purposes. Pursuant to the provisions of M. S. A. c. 278, the dairy company, on or before May 31, 1946, paid one-half the real estate tax and simultaneously served and filed its petition, as required by c. 278, claiming said real estate to be exempt from taxation. No hearing was held on the petition prior to November 1, 1946. The company did not pay any part of the unpaid balance of the real estate tax before November 1, 1946, nor was such payment waived by court order. All proceedings in regard to the petition were dismissed by mandate of M. S. A. 278.03, which provides in part that if the proceedings instituted by the filing of the petition have not been completed before November 1 next following the filing of the petition the petitioner shall pay 50 percent of the remaining unpaid taxes for the current year or 50 percent of the remaining unpaid tax based upon the probable value of the property, if the value has been found by the court upon application. This section of the statute also provides:

> "* * * Failure to make payment of such additional amount shall operate automatically to dismiss the petition and all proceedings thereunder unless such payment is waived by an order of the court * * *."

The 1945 personal property taxes were paid in full, but none of the real estate or personal property taxes assessed for the year 1946 have been paid.

After dismissal of the proceedings brought under the provisions of c. 278, the dairy company brought this action pursuant to M. S. A. c. 555, praying for a judgment declaring and adjudging the land, plant, machinery, and equipment described in the warranty deed and bill of sale referred to in the amended complaint to be exempt from taxation as of May 1, 1945; that all assessments, levies, and taxes described in the complaint be declared wholly null and void and of no legal effect; that the property retain its status of exemption from taxation until such time as the United States should be divested of its interest in the

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property; and, by way of supplemental relief, for an order decreeing the refund to the company of the first half of the 1945 taxes paid by it as above referred to.

Two issues are raised by the appeal: (1) Is the dairy company entitled to proceed under the declaratory judgments act? (2) Does the complaint set out facts entitling the company to relief under this act?

1. We must first consider whether the declaratory judgments act is available for the purpose of determining whether the property under consideration is exempt from taxation. Defendants contend that the declaratory judgments act is not applicable here because the legislature provided an adequate and exclusive remedy by enacting the laws now appearing as M. S. A. 277.02 and 278.01. Section 277.02 contains provisions for relief from assessments for personal property taxes and reads in part as follows:

> "On the fifth secular day of April, of each year, the county treasurer shall make a list of all personal property taxes remaining delinquent April first, and shall immediately certify to and file the same with the clerk of the district court of his county, and upon such filing the list shall be prima facie evidence that all of the provisions of law in relation to the assessment and levy of such taxes have been complied with. On or before the tenth secular day thereafter, any person whose name is embraced in such list may file with the clerk an answer, verified as pleadings in civil actions, setting forth his defense or objection to the tax or penalty against him. The answer need not be in any particular form, but shall clearly refer to the tax or penalty intended, and set forth in concise language the facts constituting his defense or objection to such tax or penalty. The issues raised by such answer shall stand for trial at any term of court in such county in session when the time to file answers shall expire, or at the next general or special term appointed to be held in such county; and, if no such term be appointed to be held within 30 days thereafter, then the same shall be brought to trial at any general term appointed to be held within the

judicial district, upon ten days' notice. The county attorney of the county within which such taxes are levied, or, if there be none, of the county within which such proceedings are instituted, shall prosecute the same. At the term at which such proceedings come on for trial, they shall take precedence of all other business before the court. The court shall, without delay and summarily, hear and determine the objections or defenses made by the answers, and at the same term direct judgment accordingly, and in the trial shall disregard all technicalities and matters of form not affecting the substantial merits. If the taxes and penalties shall be sustained, the judgment shall include costs."

Section 278.01 provides for a defense or objection to taxes on real estate as follows:

"Any person having any estate, right, title, or interest in or lien upon any parcel of land, who claims that such property has been partially, unfairly, or unequally assessed, or that such parcel has been assessed at a valuation greater than its real or actual value, or that the tax levied against the same is illegal, in whole or in part, or has been paid, or that the property is exempt from the tax so levied, may have the validity of his claim, defense, or objection determined by the district court of the county in which the tax is levied by serving copies of a petition for such determination upon the county auditor, county treasurer, and the county attorney and filing the same, with proof of such service, in the office of the clerk of the district court on or before the first day of June of the year in which such tax becomes payable."

As to the real estate taxes, defendants claim that there is no need for proceedings for a declaratory judgment, because, they argue, M. S. A. c. 278 is adequate, speedy, and complete, and that if a taxpayer fails or refuses to comply with the requirements of that statute the declaratory judgments act was not meant as another remedy. They cite Farmers & Merchants Bank v. Billstein, 204 Minn. 224, 283

N. W. 138. That action was in mandamus to compel a county auditor in this state to issue certificates stating the amount required to redeem certain lands of plaintiff from tax sales and commanding the county treasurer to receive such money and issue the proper certificate of redemption. Plaintiff appealed from the judgment quashing the writ of mandamus issued and duly served on the ground that mandamus was not the proper remedy. It was held that mandamus was the proper remedy. In reversing the trial court, this court said (204 Minn. 227, 283 N. W. 140):

> "The declaratory judgments law was not designed to supplant other remedies well established and working satisfactorily. Miller v. Siden, 259 Mich. 19, 242 N. W. 823."

In Bell Tel. Co. v. Lewis, 313 Pa. 374, 376, 169 A. 571, where it was held that an action for a declaratory judgment against the governor to test the constitutionality of certain statutes could not be maintained, the court said:

> "* * * Such a proceeding will not be entertained where another statutory remedy has been provided in cases of similar import; Ibid., 471 [284 Pa. 455, 131 A. 265]; Leafgreen v. LaBar, 293 Pa. 263 [142 A. 224]; Nesbitt v. Manufacturers' Casualty Ins. Co., 310 Pa. 374 [165 A. 403]. Here the plaintiff has a fully adequate remedy in which to test the question which it raises, the constitutionality of the statutes, by mandamus proceedings against the secretary of highways: * * *."

Defendants also cite cases from other jurisdictions in support of the theory that proceedings for declaratory judgments are not authorized where another statutory remedy has been provided for the character of the case presented. See, Williams v. Tawes, 179 Md. 224, 17 A. (2d) 137, 132 A. L. R. 1105; Lisbon Village Dist. v. Lisbon, 85 N. H. 173, 155 A. 252; Manufacturers Nat. Bank v. City of Detroit, 285 Mich. 273, 280 N. W. 760; Annotations, 132 A. L. R. 1120, 12 A. L. R. 76, 50 A. L. R. 48; 16 Am. Jur., Declaratory Judgments, § 21. Defendants claim that this court has not inti-

mated in any cases which have been before it involving c. 278 that the issues which it authorizes may be presented in the alternative upon application for a declaratory judgment. Cited is Saxhaug v. County of Jackson, 215 Minn. 490, 497, 10 N. W. (2d) 726, wherein defendants in this case contend that this court indicated the exclusiveness of the procedure allowed by c. 278 by stating that "the statute [M. S. A. c. 278] permitting him [landowner] to contest the validity of taxes by petition should be liberally construed to afford him relief not otherwise open to him." In Rosso v. Village of Brooklyn Center, 214 Minn. 364, 8 N. W. (2d) 219, it was held that because c. 278 affords a taxpayer an adequate remedy to contest assessment proceedings or the collection of the assessment the taxpayer is not entitled to maintain a suit in equity for an injunction.

The dairy company argues that this court has on several occasions held that the declaratory judgments act affords an alternative remedy, the application of which is to be liberally construed whenever there exists a justiciable issue the decision of which will terminate a controversy, citing Montgomery v. Minneapolis Fire Dept. Relief Assn., 218 Minn. 27, 15 N. W. (2d) 122; Barron v. City of Minneapolis, 212 Minn. 566, 4 N. W. (2d) 622; State Farm Mut. Auto Ins. Co. v. Skluzacek, 208 Minn. 443, 294 N. W. 413; Leighton v. City of Minneapolis, 222 Minn. 516, 25 N. W. (2d) 263. Only one of these cases—the Leighton case—hereinafter considered, involved a tax matter.

The uniform declaratory judgments act was adopted in this state by L. 1933, c. 286. Prior to that time, the method of judicially testing the validity of personal property taxes (M. S. A. 277.02) was not available until after the tax became delinquent. A taxpayer who paid the tax in order to avoid penalties before delinquency and who sued for refundment could be defeated by the claim that payment was voluntary. 6 Dunnell, Dig. & Supp. §§ 9516-9520. Equitable relief was denied in the ordinary case on the theory that the remedy at law was adequate. Wall *v.* Borgen, 152 Minn. 106, 188 N.W. 159. See, also, 6 Dunnell, Dig. § 9536, and Id. Dig. & Supp. § 9537. It is true that M. S. A. c. 274 provides administrative methods for the

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review, correction, and equalization of assessments. See, also, 15 Minn. L. Rev. 692. Although of some advantage, the opportunity given the taxpayer by this chapter to seek relief through administrative channels does not appear to be so complete as to satisfy the need for a prompt judicial determination of his rights. There has been no change in the statutory remedy relating specifically to personal property taxes, and, apart from the declaratory judgments act, it appears to us that no prompt judicial relief is available, except under special circumstances, until after the personal property tax has become delinquent. We believe that the declaratory judgments act was intended to provide relief in such situations, and if the law were the same now as it was then we would conclude that the declaratory judgments act was available to test the validity of either real or personal property taxes. However, the legislature had since provided a specific method by which real estate taxes can be questioned. L. 1935, c. 300, § 1 (M. S. A. 278.01). Under this law, taxpayers can have their rights determined with reference to real estate taxes without incurring a penalty and without running the risk of having the payment considered voluntary. Having afforded this specific statutory remedy, we feel that the legislature intended to remove proceedings to question the validity of real estate taxes from the scope of the declaratory judgments act, at least where the taxes have been assessed and § 278.01 can be used.

In the case of Leighton *v.* City of Minneapolis, 222 Minn. 516, 25 N.W. (2d) 263, supra, the plaintiff sought to establish that L. 1945, c. 351, providing for a certain tax levy, was unconstitutional. The court, in holding that the plaintiff was entitled to relief under the declaratory judgments act, said (222 Minn. 518, 25 N.W. (2d) 264):

> "• • • The act is not an extraordinary remedy, but an alternative remedy where there is a justiciable issue, the decision upon which will terminate a controversy. There is such a controversy here, and the act applies."

The Leighton case must be distinguished from the case at bar with reference to the real estate tax, because in that

case the opinion does not indicate that the tax has been assessed so as to give the plaintiff an opportunity to file a petition under M. S. A. 278.01. Here, the real estate taxes were assessed for both the years 1945 and 1946, and the dairy company availed itself of the provisions of § 278.01 by paying one-half the 1945 real estate tax prior to May 31, 1946, and filing its petition in the manner provided for in that section. In that petition it claimed that the 1945 tax was invalid and that the property described in the petition was exempt from taxation. The question as to the validity of the 1945 real estate tax could have been determined under that petition, as provided for in the statute, if the proceedings instituted by the filing of the petition had been completed before November 1 next following the filing of the petition. This was not done, but prior to November 1 the dairy company still had a remedy under c/278 by either paying 50 percent of the remaining unpaid taxes for the current year before November 1 or by applying to the court before that time for the waiver of this payment, as provided for in the statute. Inasmuch as none of these statutory requirements were completed before November 1 next following the filing of the petition, the statute made it mandatory to dismiss the petition, which was done.

The same statute was available to the dairy company with reference to the 1946 real estate tax. No petition was filed under § 278.01 for a determination of the 1946 real estate tax, nor was any of the tax paid. Instead of availing itself of the provisions of c. 278 to determine the validity of the 1946 real estate tax, the company apparently concluded that inasmuch as the petition relative to the 1945 real estate tax had been automatically dismissed the entire question of exemption could be raised by proceedings under the declaratory judgments act as an alternative remedy. The company cannot be criticized for this procedure in view of the fact that we can find no prior determination by this court on the particular question before us as to whether the declaratory judgments act is available as an alternative remedy when c. 278 provides a specific remedy to determine the validity of real estate taxes in this state.

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In order that there shall be no future confusion on this particular point of the law, we hold that in enacting M. S. A. c. 278 it was the intention of the legislature to provide an adequate, speedy, and simple remedy for any taxpayer to have the validity of his claim, defense, or objections determined by the district court in matters where the taxpayer claims that his real estate has been partially, unfairly, or unequally assessed, or that it has been assessed at a value greater than its real or actual value, or that the tax levied against the property is illegal in whole or in part, or has been paid or that the property is exempt from the tax so levied. We believe that when the legislature enacted L. 1935, c. 300 (M. S. A. c. 278) it did so for the purpose of providing a rather simple remedy for the taxpayer to have his real estate tax grievances determined, and that it was never the intention that the aggrieved taxpayer could first proceed under this statute and, if his proceeding was dismissed for noncompliance, then come under the declaratory judgments act to have the same issue decided in another manner. If under the circumstances of this case with reference to the real estate taxes the declaratory judgments act is made available as an alternative remedy when c. 278 provides such a special remedy for the determination of questioned real estate tax matters, it will lead to a multiplicity of suits, which seems uncalled for under the circumstances. We hold that, so far as the determination of tax matters referred to in § 278.01 on real estate is concerned, c. 278 provides the necessary requisites and that L. 1933, c. 286 (M. S. A. c. 555), known as the uniform declaratory judgments act, is not available to the dairy company as an alternative remedy.

The legislature has not remedied the defects of the old method of testing personal property taxes under M. S. A. 277.02. The taxpayer must wait to file his defense or objections to the personal property tax or penalty until the tax has become delinquent, and if the taxes and penalties are sustained by the court he then must pay, in addition to the tax, the amount of the penalty. Because of these defects in procedure, we believe that with respect to personal property taxes relief under the declaratory judgments act is

available. The taxpayer may commence his action under the declaratory judgments act before the taxes become delinquent and before any penalty attaches. We therefore hold that the declaratory judgments act was available to plaintiff for the purpose of determining its objections or defenses to the assessment of the personal property taxes under consideration.

2. We now ask whether the dairy company is entitled to the relief which it seeks. In passing on this, we are considering only the matter of personal property taxes involved in the pleadings, as we have already held herein that the declaratory judgments act is not available as to the real estate taxes.

The allegations of the complaint show that the dairy company entered into an agreement with the United States, hereinafter called the government, on June 9, 1944, whereby (a) the dairy company agreed to acquire the necessary real estate and develop a plant for the manufacture of dried milk products; (b) the government agreed to buy the plant or facility from the dairy company upon completion and then lease it back for a period of time to the dairy company; (c) a formula was established for fixing the consideration to be paid by the government and the rent to be paid by the dairy company; and (d) provision was made for repurchase of the facility by the dairy company upon termination of the emergency which made its establishment by the government necessary.

Five exhibits are attached to and made a part of plaintiff's complaint. They are:

(a) The contract of June 9, 1944, which sets out the basic understanding between the parties as outlined above.

(b) The amendment of November 6, 1945, to the contract of June 9, 1944, which extended the time for the completion of the facility by the dairy company to December 31, 1945. It recited, however, that "said facility was placed in production on or about the first day of April, 1945," and provided "That the title to the facility shall be considered as vesting in the Government as of the first day of April, 1945."

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(c) The warranty deed and bill of sale dated November 24, 1945, by virtue of which the dairy company transferred to the government the facility here involved for $415,285.51 upon the condition that "if, after the date of a declaration by the President of the United States of America that the above described premises and said machinery, equipment and personal property are no longer needed by the party of the second part [the government] for the purposes of 'An Act to Promote the Defense of the United States', • • • and at any time during the life of a lease between the parties hereto, dated June 9, 1944, which became effective April 1, 1945, or during the life of any extension or renewal of said lease, said party of the first part [the dairy company] pays to the said party of the second part [the government] a sum of money to be determined as hereafter provided, the title to the parcel of land hereinbefore described and the buildings and improvements situate thereon, the license agreement and the rights thereunder, and the title to the machinery, equipment and personal property shall revert to the said party of the first part." The repurchase price was to be ascertained by reducing the sum paid to the dairy company by a fixed percentage annually during the term of the lease.

(d) The lease of June 9, 1944, whereby the government leased the facility which it proposed to acquire from the dairy company to it "To Have and to Hold the same for a period of five (5) years beginning on the date when clear title to the facility is acquired by Lessor." The lease contains provisions governing public liability insurance, inspection of premises, subletting, operation of the facility as a milk-drying plant, termination, and renewal by the parties. From these provisions, it is clear that the principal interest of the government was to establish a plant which would produce the milk products then needed as a part of the national defense program. From its inception, the facility was in the possession and under the control of the dairy company, subject to the supervision of the government. Paragraph 12 of this lease provides:

> *"During the term of this lease, Lessee shall pay promptly, and at least ten days prior to delinquency, all*

taxes assessed or other governmental charges that may be legally imposed upon or constitute a lien against the facility or any part thereof." (Italics supplied.)

(e) A lease amendment, dated November 6, 1945, fixing the term of the lease as five years from April 1, 1945.

The complaint alleges that from April 1, 1945, to the "present date" the dairy company was in possession of the facility "as lessee of the United States." Paragraph X of the complaint reads:

> "That the President of the United States has made a declaration, effective July 31, 1946, that said plant and equipment is no longer needed by the United States for the purposes expressed in said contract, lease and deed of conveyance. The plaintiff has not to this date made any payment to the United States nor done anything whatsoever to work a reversion of the title to said property as provided in said Warranty Deed and Bill of Sale; nor has plaintiff signified to the United States in any manner an intention on its part of doing so at any time in the future."

On the basis of these facts, the dairy company seeks to be relieved from any possible tax burden, not because of any immunity to which it is itself entitled, but because of the conceded immunity of its "lessor".

It has long been established that the properties, functions, and instrumentalities of the federal government are immune from state taxation. M'Culloch *v.* Maryland, 17 U. S. (Wheat.) 316, 4 L. Ed. 579. The extent to which persons who deal with the federal government should be permitted to benefit by this immunity has proved a difficult question. The authorities have been reviewed by this court in re Petition of S. R. A. Inc. 219 Minn. 493, 18 N. W. (2d) 442. That case involved the owner of the equitable title to real estate. The interest of such an owner is in some respects similar to and in others distinct from that of the dairy company under the instruments above reviewed. Apparently, the parties felt when they inserted paragraph 12 in the lease that the property would be subject to taxation. We do not de-

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cide that such a provision would deprive the federal government of the immunity which it would otherwise have. We do feel, however, that a private corporation, having bargained to pay the taxes assessed during the term of the lease, should not be permitted to avoid an obligation which it voluntarily assumed by asserting rights reserved to the federal government, which is not a party to this proceeding. The dairy company's claim that paragraph 12 of the lease refers only to taxes legally assessed does not persuade us. If it was contemplated that the interest of the government in the facility was to exempt the dairy company from all taxes, both real and personal, paragraph 12 would be meaningless.

It is our judgment, therefore, that while the declaratory judgments act is available for the purpose of testing the validity of a questioned tax levy and assessment as to the personal property, the dairy company in this action is not entitled to relief under its terms. Having voluntarily assumed to pay the tax, it is faced with this dilemma: (a) If it is not obligated to pay the tax, it has no such interest in the question as will entitle it to a declaratory judgment in its favor; (b) if it is obligated to pay the tax, it is so because of a duty voluntarily assumed, and it is not entitled to a judgment declaring its own promise to pay the taxes to have been a meaningless thing. For these reasons, the order of the trial court sustaining the demurrers to the complaint is affirmed.

Affirmed.

Julius J. Olson, Justice (concurring).

I concur in the result.

Peterson, Justice (dissenting).

I dissent from so much of the decision as holds that a taxpayer may have his personal property tax liability determined under the declaratory judgments act. Regardless of what we may have said in the Leighton and similar cases, I think that it was the legislative intent that the liability of a particular taxpayer for a particular personal property tax should be determined exclusively in the proceedings

under the statute for the enforcement of personal property taxes.

MAGNEY, Justice (dissenting).
I concur in the dissent in part of Mr. Justice Peterson.

MATSON, Justice (dissenting).
I concur in the dissent in part of Mr. Justice Peterson.

On April 14, 1948, the following order was entered:

Upon the petition of the appellants in the above entitled action for a rehearing for the purpose of clarification of the last paragraph of the opinion filed March 12, 1948, and upon due consideration of said petition by the court, it is hereby ordered that the last paragraph of the opinion filed in said action on the 12th day of March 1948 be and is hereby changed to read as follows:

> "It is our judgment, therefore, that, while the declaratory judgments act is available for the purpose of testing the validity of a questioned tax levy and assessment as to the personal property, the dairy company in this action is not entitled to relief under its terms. Since the dairy company has voluntarily assumed to pay the tax, it is not entitled to a judgment declaring its own promise to pay the taxes to have been a meaningless thing. For these reasons, the order of the trial court sustaining the demurrers to the complaint is affirmed."

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